2023 WL 2069140 (N.Y.Work.Comp.Bd.)

Workers' Compensation Board

State of New York

EMPLOYER: TRIBORO CTR FOR REHAB & NURSIN

Case No. G281 4289
Carrier ID No. 2440337166 W036636
February 9, 2023

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Date of Accident 3/7/2020

The Full Board, at its meeting on January 24, 2023, considered the above captioned case for Mandatory Full Board Review of the Board Panel Memorandum of Decision filed September 26, 2022.

ISSUE

The issue presented for Mandatory Full Board Review is whether there is sufficient evidence in the record that COVID-19 was prevalent in claimant's work environment to establish this claim for COVID-19.

The Workers' Compensation Law Judge (WCLJ) established this claim for COVID-19 with a date of accident of March 7, 2020, and made awards.

The Board Panel majority affirmed the WCLJ decision.

The dissenting Board Panel member would find that there is insufficient evidence in the record that COVID-19 was prevalent in claimant's work environment and would disallow the claim.

The carrier filed an application for Mandatory Full Board Review on October 12, 2022, arguing that there is insufficient evidence that claimant contracted COVID-19 at work and that the “prevalence standard and the case law supporting it do not support the establishment of this claim.”

The claimant did not file a timely rebuttal.

Upon review, the Full Board votes to adopt the following findings and conclusions.

FACTS

Claimant filed an initial EC-3 (Employee Claim) on July 6, 2020, alleging that he contracted COVID-19 at work, that the onset of the illness was on March 9, 2020, and that he stopped working on that date. Claimant indicated that his job title was "PCC super user" and described his normal work activities as, "Organise (sic) orientation for new intakes. Liase (sic) with insurance companies with the billing."

Claimant filed a second C-3.0 on August 11, 2020, indicating that he was employed as a "Pcc Superuser/LPN" and "was exposed to COVID-19 while caring for known positive residents and patients at the nursing home."

The carrier controverted the claim.

The record reflects that claimant was admitted to New York-Presbyterian Hospital from March 15, 2020, to April 20, 2020, and was diagnosed with periumbilical abdominal pain and COVID-19 (see doc. ID #346118700). Claimant was subsequently admitted to Maimonides Medical Center on June 18, 2020, due to worsening shortness of breath "secondary to Pulmonary emboli likely secondary to recent COVID-19 infection" (doc. ID #346687084). The reports from Maimonides Medical Center indicate that claimant had been hospitalized in March 2020 for approximately six weeks due to COVID-19 and had developed hypertension and renal failure necessitating dialysis (doc. ID #346687083).

***2** At a hearing on February 10, 2021, claimant testified that he was employed as a licensed practical nurse (LPN) and that his job involved interacting with patients and giving them medicine. He believed that COVID-19 was prevalent in his work environment.

By a decision filed February 18, 2021, the WCLJ found prima facie medical evidence for COVID-19 and continued the case.

The carrier's consultant, Dr. Kamelhar, issued a report dated February 22, 2021, based on a review of claimant's medical records, in which he stated that "causal relationship does exist between COVID illness and the patient's medical history as provided." Dr. Kamelhar subsequently examined claimant on March 19, 2021. In his resulting report, Dr. Kamelhar concluded that claimant developed hypertension, renal dysfunction, and thromboembolic disease as a result of contracting COVID-19. Dr. Kamelhar noted that claimant did not suffer from those conditions prior to contracting COVID-19 and that "[a]ll of these medical findings and symptoms are well described as occurring [in] patients ill with COVID-19."

At a hearing on April 13, 2021, claimant testified that in March 2020 he was working full time as an LPN in a nursing home and rehab center. He was not sure of the date he tested positive for COVID-19, but stated that it was "about March 20th [2020], I think" (Hearing Transcript, 4/13/21, p. 5). His symptoms began on March 6, 2020, a Friday. He began feeling feverish while at work and went home. He was scheduled to work the next day "on a special assignment to take temperatures for the residents..." (p. 6). However, he was feverish the next day and called his boss and told her he could not come to work. He continued to be sick throughout the week and could not get out of bed. He remained out of work and on Sunday, March 15, 2020, his wife rushed him to the hospital, and he was admitted. He was not discharged until April 20, 2020. While in the hospital he tested positive for COVID-19. Staff members and patients at the facility were not using PPE when he became sick. He has not returned to work because he suffers from renal failure and shortness of breath as a result of contracting COVID-19. He was told that one of his coworkers passed away from COVID-19 sometime last year (2020). He was told by a colleague that most of the residents at the facility where he worked died from COVID-19 in 2020. He would drive to work. Claimant testified that his job involved direct patient care.

On cross-examination, when asked about the job description in his initial C-3 ("PCC super user"), claimant explained: "PCC Super User, like I help the staff sometimes with computer problems. We have computer issues" (p. 11). 20 percent of his job involved dealing with computer issues. When providing patient care, he would be assigned to distribute medications to all the patients on a floor and would sometimes dress wounds. When asked who would assign him to a floor to perform patient care,

claimant responded: “It depends on. I can't remember the name right now” (p. 13). He was not aware of any employees at the facility who had COVID-19 prior to when he stopped working on March 6, 2020. When asked whether he was aware of any patients who had COVID-19 prior to when he stopped working on March 6, 2020, claimant responded:

***3** People was - people were getting - I didn't - we didn't know what Covid was. That - we didn't know - how do I put it? We didn't know how bad it was then. That was the initial - when it start - people were falling ill. So that was when we started putting in place things - setting up things on how to check and - to check temperatures and monitor those who are having high temperatures and having fever and everything. So I don't-I don't - I didn't know who had Covid, as in Covid. I didn't know anything about that.

(p. 15). Claimant lived with his wife and four children, but none of them got COVID-19 before the claimant.

The employer's director of nursing testified that claimant's job title was “LPN but he works in, actually, like orienting and helping us with PCC, with our computer system” (p. 19). 100 percent of claimant's job involved orientation and assisting with the computer. Claimant did not have any direct patient interaction and was “in an administrative office” (p. 20). As of March 6, 2020, no employees at the facility had been diagnosed with COVID-19, and she did not recall if any patients had been diagnosed with COVID-19 at that time.

On cross-examination, the employer's director of nursing testified that on any given day there were 385 to 390 patients at the facility. There were 430 staff members at the facility. PPE did not become mandatory at the facility until mid-March of 2020. The claimant reported directly to her. She was not sure if claimant ever left his office to assist staff at nursing stations throughout the facility. She testified that claimant was responsible “for medication reconciliation, and, again, if there was any question regarding the pharmacy, he would reconcile with the pharmacy, any orders that the pharmacy had” (p. 24). He performed those duties in his office. When asked whether claimant would ever leave his office and assist patients, she responded: “I can't speak on that. I don't know” (p. 27). She was not aware of claimant doing anything other than “PCC or pharmacy” (p. 28). On questioning by the WCLJ, the employer's director of nursing testified that claimant would have to troubleshoot computers located in nursing stations and corridors in the facility.

After listening to the witnesses' testimony and summations by the parties, the WCLJ found that the record reflected that claimant had “interaction with all of the other staff members within the facility” (pp. 37-38), that claimant credibly testified that he had “some interaction” (p. 38) with patients, and that claimant had “met the burden of demonstrating prevalence in the workplace and his exposure to Covid-19” (p. 39). The WCLJ established the claim for COVID-19, set claimant's average weekly wage at $1, 463.64, made awards, and approved a fee of $4, 600.00 to claimant's attorneys. The findings and awards made at the April 13, 2021, hearing are reflected in a decision filed April 20, 2021.

***4** The carrier requested administrative review, arguing that there was insufficient evidence that claimant contracted COVID-19 at work and that the claim should be disallowed.

In rebuttal, claimant argued that COVID-19 was prevalent in his workplace and that the WCLJ decision should be affirmed. Claimant argued that his illness occurred at “a time when COVID-19 was particularly prevalent throughout New York State.” Claimant maintained that COVID-19 was especially prevalent in nursing homes, such as the one where he worked.

LEGAL ANALYSIS

It is well established that, in order to be compensable under the Workers' Compensation Law (WCL), an accidental injury must have arisen both out of and in the course of the claimant's employment (see Matter of Rosen v First Manhattan Bank, 202 AD2d 864 [1994], aff'd 84 NY2d 856 [1994]; Matter of Thompson v New York Tel. Co., 114 AD2d 639 [1985]; see WCL §§ 2[7], 10[[1]).

If a claimant is deemed credible with respect to the happening of an accident or illness (i.e., arising in the course of employment) and the presumption in WCL § 21(1) is found to apply (i.e., arising out of employment), the presumption may be rebutted with substantial evidence to the contrary (Matter of Pinto v Southport Corr. Facility, 19 AD3d 948 [2005]).

In Matter of McDonough v Whitney Point Cent. School, 15 AD2d 191 (1961), the Third Department found that an epidemic was sufficient to constitute an abnormal condition of sufficient gravity to find the happening of an accident. In doing so, the Third Department relied upon the prior Court of Appeals decision in Matter of Lerner v Rump Bros., 241 NY 153 (1925), wherein the Court stated, "A distinction exists between accidental injury and disease, but disease may be an accidental injury. The exception arises out of abnormal conditions which must be established to sustain an award. Two concurrent limitations have been placed on the right to recover an award when a disease, not the natural and unavoidable result of the employment, is developed during the course of the employment, although it does not follow that compensation should be awarded in all cases coming literally within these limitations. First, the inception of the disease must be assignable to a determinate or single act, identified in space or time.

Secondly, it must also be assignable to something catastrophic or extraordinary [citations omitted]."

In Matter of Middleton v Coxsackie Correctional Facility, 38 NY2d 130 (1975), the Court of Appeals noted that the Board's finding that persistent impacts of exposure provided "substantial evidence from which the board could determine that this was an accident gauged by the common-sense viewpoint of the average man, [and also that] the time-definiteness required of an accident was satisfied by application to the result..."

In Matter of Johannesen v New York City Dep't of Hous. Pres. & Dev., 84 NY2d 129 (1994), the Court of Appeals stated, "[t]he seriously adverse environmental conditions to which claimant was subjected as part of her job and workplace reasonably qualify as an unusual hazard, not the 'natural and unavoidable' result of employment ([WCL] § 2[7])."

***5** When viewed together, McDonough, 15 AD2d 191 (1961), which was established for mumps following exposure to sick children during an epidemic, Middleton, 38 NY2d 130 (1975), which was established for tuberculosis following exposure to a coughing inmate with the condition, and Johannesen, 84 NY2d 129 (1994), which was established for aggravation of asthma due to exposure to second-hand smoke from co-workers, indicate that if a claimant contracts COVID-19 through close contact with the public (such as a patient), such exposure could be found to be a work-related accident within the meaning of WCL § 2(7).

The Board has found that when alleging that COVID-19 was contracted at work, the claimant may show that an accident occurred in the course of employment by demonstrating prevalence (Matter of FOJP Service Corporation, 2021 NY Wrk Comp G2795143). Prevalence is evidence of significantly elevated hazards of environmental exposure that are endemic to or in a workplace which demonstrates that the level of exposure is extraordinary (id.) A claimant may demonstrate prevalence through evidence of the nature and extent of work activities, which must include significant contact with the public and/or co-workers in an area where COVID-19 is prevalent (id.). Public-facing workers and workers in a highly prevalent COVID-19 environment are the workers who can show that the exposure was at such a level of elevated risk as to constitute an extraordinary event (id.). Prevalence in the context of a claim for COVID-19 under the WCL is a legal determination, not a scientific determination (id.).

In Matter of ABF Freight (2021 NY Wrk Comp G2811695), the Board found that there was "sufficient to establish that COVID-19 was prevalent in the claimant's work environment" and established the claim as an accidental injury resulting in COVID-19. The Appellate Division, Third Department affirmed the Board's decision in Matter of ABF Freight (Matter of Pierre v ABF Freight, __ AD3rd __, 2022 N.Y. Slip Op. 07118). The Court found that "the contraction of COVID-19 in the workplace reasonably qualifies as an unusual hazard, not the natural and unavoidable result of employment and, thus, is compensable under the Workers' Compensation Law" (id. [internal quotation marks, brackets and citation omitted]).

Here, claimant became symptomatic on March 6, 2020, and stopped working on that date. He was hospitalized on March 15, 2020, and tested positive for COVID-19 while in the hospital. Claimant testified that he was told that one of his coworkers had

passed away from COVID-19 sometime in 2020, and was told by a colleague that most of the residents at the facility where he worked died from COVID-19 in 2020. The employer's director of nursing testified that as of March 6, 2020, no employees at the facility had been diagnosed with COVID-19, and she did not recall if any patients had been diagnosed with COVID-19 at that time.

Although COVID-19 may have become prevalent in the facility where claimant worked at some point during the pandemic, the relevant question in this case is whether COVID-19 was prevalent in the facility on March 6, 2020, when claimant became ill, and the period immediately preceding that date when claimant contracted the condition. Claimant's testimony that he was advised that a coworker had died from COVID-19 at some point in 2020, and that "most" of the residents in the facility had died from COVID-19 in 2020, is insufficient to support a finding that COVID-19 was prevalent in the facility at the time claimant contracted the disease. It is noted that claimant's assertion that ""most" of the residents in the facility died from COVID-19 in 2020 is contradicted by data published by the New York State Department of Health which indicates that as of January 9, 2023, a total of 31 residents of the facility had been confirmed or suspected to have died from COVID-19 (https://www.health.ny.gov/statistics/diseases/covid-19/fatalities_nh.pdf). Although there were thousands of known cases of COVID-19 by the end of March 2020, at the time claimant became symptomatic and stopped working on March 6, 2020, there were only a handful of confirmed cases of COVID-19 in New York State (https://coronavirus.health.ny.gov/positive-tests-over-time-region-and-county).

***6** In Matter of Bronx Gardens Rehabilitation (2021 NY Wrk Comp G2815436), claimant worked as a supervising nurse in a rehabilitation facility and developed symptoms of COVID-19 on March 19, 2020. At the time claimant contracted COVID-19, no other employees had tested positive and only one patient at the facility had tested positive, and the Board Panel found that there was insufficient evidence in the record to find that COVID-19 was prevalent in claimant's workplace. The claim was established, however, based on evidence that claimant had specific exposure to the one known COVID-19 positive patient in the facility prior to becoming ill.

In the present case, there is simply no evidence that any of claimant's coworkers or patients in the facility where claimant worked had contracted COVID-19 prior to claimant, and therefore the record does not support a finding that the condition was prevalent in claimant's workplace at the time claimant contracted COVID-19, or that claimant had specific exposure to someone who was COVID-19 positive (see Matter of Precore Inc., 2021 NY Wrk G2719151).

Therefore, the Full Board finds that the evidence currently in the record fails to demonstrate that COVID-19 was prevalent in claimant's workplace at the time he contracted the condition. However, this finding is made without prejudice to claimant producing further evidence that COVID-19 was prevalent in his workplace at the time he contracted the condition, in support of this claim. Such evidence may include, but not be limited to, the testimony of other employees of the facility where claimant worked and documentary evidence of known, suspected, or possible cases of COVID-19 among the staff and residents at the facility in the weeks immediately preceding and following March 6, 2020. The employer and carrier shall fully comply with any reasonable requests for documents or other evidence relevant to this claim made by claimant's attorneys.

CONCLUSION

ACCORDINGLY, the WCLJ decision filed April 20, 2021, is RESCINDED, without prejudice. No further action is planned by the Board at this time.

Clarissa Rodriguez
Chair

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